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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 88.

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONERS.

OPINION BELOW.

The opinion of the Court of Appeals (R. 213-240) is reported at 276 F. 2d 617.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 24, 1960 (R. 240). A Petition for Rehearing was denied on April 14, 1960 (R. 241). The Petition for a

Writ of Certiorari was filed on May 13, 1960, and was granted on June 27, 1960 (R. 241). The jurisdiction of this court was invoked under 28 U. S. C. A., Sec. 1254 (1).

QUESTIONS PRESENTED.

I. Whether books and records customarily kept by Petitioners in their business of accepting wagers on horse races (where they have prepared and filed with the District Director of Internal Revenue the special tax return and application for registry; paid the special \$50.00 occupational tax; received their wagering stamp; filed monthly reports of wagers accepted by them and paid a 10% tax on wagers so reported) are protected by the Fourth and Fifth Amendments to the Constitution of the United States from search and seizure for the purpose of being used as evidence in a criminal trial against them.

II. Whether private books and records, which are customarily maintained in the orderly conduct of the wagering business, lose their status as private books and records, so as to be seized and used in evidence against them in a criminal prosecution, notwithstanding the Fourth and Fifth Amendments to the Constitution of the United States, because Title 26, U. S. C., Sections 4403, 4423, and 6001, and U. S. Treasury Regulations 325.32 require books and records to be kept by persons reflecting the amount of income and wagering tax due the United States.

III. Whether after a government agent has testified for the government, the government is required to produce the statements, memoranda and reports of the government agent, either signed or adopted by him and which are relevant to the subject matter of his testimony, upon the demand of the defendant's attorney made prior to cross-examination of the government agent, pursuant to Title 18, U. S. C., Sec. 3500 (The Jencks Act).

**AMENDMENTS TO CONSTITUTION OF
UNITED STATES.**

Amendment IV (App. 59).

Amendment V (App. 59).

**STATUTES, RULE AND REGULATION
INVOLVED.**

Title 18, U. S. C., Section 1905 (App. 59).

Title 18, U. S. C., Section 3500 (a), (b), (c) (App. 60).

Title 26, U. S. C., Section 4403 (App. 61).

Title 26, U. S. C., Section 4423 (App. 61).

Title 26, U. S. C., Section 6001 (App. 61).

Title 26, U. S. C., Section 7201 (App. 61).

Title 26, U. S. C., Section 7213 (App. 62).

U. S. Treasury Regulations 325.32 (a) (b) (App. 62).

Federal Rules of Criminal Procedure 41 (b) (App. 63).

STATEMENT.

On July 25, 1957, a five Count Indictment was returned in the United States District Court for the Eastern District of Illinois. Count I charged Petitioner, Thomas Clancy, with knowingly and wilfully making a false, fictitious and fraudulent statement and representation of a material fact to Internal Revenue Agents, Martin O. Mochel and Wilbur L. Buescher, on or about December 13, 1956, in violation of Title 18, U. S. C. 1001 (R. 24) of which the jury found him guilty. Count II charged Petitioner, Donald Kastner, with knowingly and wilfully making a false statement to Special Agent George W. Kienzler on May 6, 1957 (R. 24-25); however, Petitioner Kastner was acquitted by the Jury of this charge (R. 188). Count III charged the defendant, James Prindable, with knowingly and wilfully making a false, fictitious and fraudulent statement to Internal Revenue Agents, Mochel and Buescher on December 14, 1956 (R. 25-26). He too was found guilty of this charge but did not join in this Petition. Count IV charged petitioners, Clancy and Kastner, and defendant, Prindable, with wilfully and knowingly attempting to evade and defeat a large portion of the wagering excise tax due and owing by said defendants, equal to 10% of the amount of said wagers (Title 26, Sec. 7201) (R. 26-29), of which the jury found them guilty. Count V charged petitioners, Clancy and Kastner, and defendant, Prindable, with conspiring to defraud the United States in the administration of certain Internal Revenue Laws (Title 18, U. S. C., Sec. 371, R. 29-32), of which the jury found them guilty.

The facts pertinent to the questions presented to this court are as follows:

On May 6, 1957, and for several years prior thereto, the Petitioners were engaged in the business of accepting

wagers on horse races, under the name of the North Sales Company, a partnership (R. 103, 123), and each year that they were so engaged in this business, petitioner, Clancy had an accountant prepare and file with the District Director of Internal Revenue at Springfield, Illinois in behalf of North Sales Company, a Special Tax return and application for registry-wagering, Form 14-C (F. S. Ex. 11-14, R. 85); stating that they operated "at large" (R. 85-87; 140 and 141); paid the \$50.00 occupational tax; and were issued their wagering stamps pursuant to said application (R. 142; R. 158). Defendants introduced in evidence their wagering stamps for the fiscal years 1955-1956 and 1956-1957 (Def. Exs. 1 and 2; R. 158). The stamps provided on their face that if a person had no principal place of business that he should carry it on his person. Only one stamp was issued for all 3 partners. The petitioners' accountant filed, with the Internal Revenue Department, monthly reports of wagers received by North Sales Company and paid a 10% tax on the amount of wagers so reported (F. S. Exs. 1-10, R. 84).

On May 6, 1957, Internal Revenue Agents went to a second floor apartment known as 2300a State Street, East St. Louis, Illinois, which was one of the places at which Petitioner, were conducting their wagering business that day, and said agents conducted a 3 hour search of the whole apartment under the purported authority of a search warrant (R. 19-21). At the time Internal Revenue Agents Kienzler and Minton arrived at said premises and before they commenced their search of said premises, the petitioner Kastner was present and was questioned by said agents, and he informed them that the North Sales Company, a partnership, had a wagering stamp, and that Thomas Clancy took care of it (R. 93). Although Agent Kienzler testified that Petitioner Kastner stated that he was waiting for "one or more phone calls" (R. 93) no arrests were made at 2300a State Street at the time of the

search (R. 98). The Agents, despite Kastner's statement, searched said premises and took books, records and documents from inside a buffet and a bottom drawer of a sewing cabinet, and from certain boxes located in said premises, all of which were listed in their return of the search warrant (R. 21-23). Information taken from the Petitioners' books and records seized and listed in the return of the search warrant was presented to the Grand Jury, which was then sitting in the Eastern District of Illinois, and subsequently, said Grand Jury returned an indictment (R. 24-32) against these defendants. The information which was presented to the Grand Jury was taken from the items listed as 1 through 15 inclusive, of the search warrant (R. 41-42).

During the trial the books and records of the Petitioners which were marked as Government's Exhibits 54 through 109 were offered and admitted into evidence on the testimony of George W. Kienzler (R. 90-92) that these were the items seized by him on May 6, 1957.

On August 14, 1957, the Petitioners filed a Motion for Return of Property and to Suppress the Evidence seized by the search warrant (T. 15). The Motion for Return of Property and to Suppress Evidence was supported by exhibits and an affidavit (R. 37-40), and subsequently, a Stipulation was entered with the U. S. Attorney (R. 41-42) agreeing as follows: that some of the information taken from the books and records seized and listed in the return of the search warrant was presented to the Grand Jury which was then sitting in the Eastern District of Illinois; that said Grand Jury subsequently returned Indictments against these defendants; that all of the books and records seized were the partnership property of the defendants (except to the extent that they may come within the exception of Sec. 7302, Internal Revenue Code 1954) and were listed as items 1 through 15, inclusive, in the return

of the search warrant for the second floor premises (R. 21-23).

The District Court overruled Petitioners' motion (R. 43, 48-53). The Petitioners again filed the same motion at the opening of the trial of this cause, and after the jury had been sworn (R. 36-37), which motion was again overruled by the court.

During the progress of the trial as the records were offered into evidence, Petitioners objected on the ground, among others, that these were private books and records protected from search and seizure by the Fourth and Fifth Amendments to the U. S. Constitution, but the objections were overruled (R. 90-92 and 159). These records of the Petitioners were used by Internal Revenue Agent Martin Mochel to determine their method of bookkeeping (R. 144) and to calculate the tax allegedly evaded by these Petitioners (R. 144-148) and they were the basis for his preparation of Government's Exhibit 115 (R. 145-146) which Agent Mochel stated was a worksheet showing his computations of Government's Exhibits 54 through 79.

Agent Mochel's computations as to the gross amount of wagers, \$103,441.30, received by North Sales Company during the month of March, 1957, was contained in U. S. Exhibit 115, (R. 146) and was the exact figure alleged in Count IV of the Indictment (R. 26-29).

In affirming the conviction in the trial court, the court below held that the books and records of the Petitioners were not protected against search and seizure under the provisions of the Fourth and Fifth Amendments because: (A) "they were a part of the outfit or equipment actually used to commit an offense" (R. 228) and, (B) they came within the "required records exception" because the records concerning the operation of the wagering business were required to be kept by persons engaged in that busi-

ness under the provisions of 26 U. S. C., Secs. 4403, 4422, 6001, and U. S. Treasury Regulations 132, Sec. 325.32; and were, therefore, not "private papers" (R. 229 and 230).

The witnesses whom the Government alleged were the agents of the North Sales Company in accepting bets were all independent operators of taverns, and each one testified in substance that they laid off bets to the North Sales Company: Marlin Behnen (R. 113), Harry Biernian (R. 114); Leo Klimas (R. 116); John Kukorola (R. 117) and Lawrence Buklad (R. 118).

During the trial, Frank Hudak, a lawyer and supervisor of a group of special agents in East St. Louis, stated that the person accepting the bet in the first place is liable for the tax unless he shows on the return he laid it off (R. 108). Norman J. Mueller, Special Agent of the Intelligence Service at East St. Louis, Illinois, also stated (R. 11), "When a bet is placed with one man and he turns the whole bet over to another, that is a layoff bet, and on such a bet as that the initial acceptor is liable for the tax provided he didn't keep a record of it." Agent Wilbur Buescher, an auditor for the Internal Revenue Department, stated (R. 103) "the person who originally accepts the wager must pay the wagering tax on layoff bets."

Internal Revenue Agents Ira L. Minton (R. 96-99); Wilbur Buescher (R. 99-104), Frank Hudak (R. 104-108), Norman Mueller (R. 109-111) and Martin Mochel (R. 142-150), among others, testified on behalf of the Government. Ira L. Minton testified (R. 97) as to his knowledge of the interview conducted by George W. Kienzler of petitioner Donald Kastner (R. 92-93). After his testimony in chief, prior to cross-examination, a demand was made by the defense for the production of any statements and reports made by the witness for the purpose of inspection and to be used to facilitate the cross-examination of said witness

(R. 97). The trial court ruled "the request will be allowed insofar as Ira Minton wrote down contemporaneously with the making of any statement of the defendant Kastner to this witness. The request will be denied if the defendant is demanding any report this witness Minton made to his superiors or his superior officer subsequent to the conversation with the defendant Kastner" (R. 97). Agent Minton admitted making a memorandum after the interview, and that the memorandum concerned the conversation that he related on the stand (R. 97).

Agent Buescher in his direct testimony for the Government testified as to his interview with Petitioner Clancy on December 13, 1956, during which Clancy was interrogated as to the applications for the federal wagering stamp and on all phases of the operation of the business, including the names of their agents (R. 100). Agent Buescher also testified as to the interview on December 14, 1956 with Prindable and Petitioner Kastner (R. 100). According to Buescher, Prindable did most of the answering and they were interrogated on their respective duties in the partnership; how they accepted wagers; whether or not there was any credit betting, and if they laid off to other "books" (R. 101). After the conclusion of Buescher's testimony, a demand was made for the memorandum prepared by him of the transactions that occurred on December 13th and December 14th of 1956 (R. 101). He admitted that he prepared and signed the statement regarding the interviews (R. 102). The court refused the demand after Buescher had answered the court's questions to the effect that he didn't take any longhand notes at the time the statement was made, and that he prepared his report and submitted it to his superior after he returned to his office (R. 102).

Agent Hudak testified that he was familiar with the testimony regarding certain interviews held with the de-

tendants and the records which were seized at 2300a State Street; he testified that he supervised the agents conducting the raid and that he also was present at the interview on July 23, 1957 when an interview was conducted by him, Agent Mueller, the U. S. Attorney, and Asst. U. S. Attorney with Petitioner Kastner; that he made notes of the latter interview and later prepared a report of the same (R. 105-106). A demand was made for the statement or memorandam and notes made by him (R. 106). In this particular instance, the court allowed the demand (R. 107). Agent Mueller testified that he was also present at the interview on July 23, 1957, and that he made notes of the interview. Upon demand, the court granted permission to examine his notes. (R. 110):

Agent Martin Mochel testified that he was present at an interview which he and Agent Buescher conducted with Petitioner Clancy on December 13, 1956, and with Prindable and Petitioner Kastner on December 14, 1956. He also testified that he prepared a memorandum which was signed by him from notes which were taken by him at the time of the interview (T. 301-302). Upon demand by counsel for the petitioners, the court again held that "only longhand notes made by the witness at the time of the interview will be turned over to the attorneys for the defendants" (T. 302-303).

SUMMARY OF ARGUMENT.

I.

As a result of a three hour search on May 6, 1957 conducted by Internal Revenue Agents, under the purported authority of a search warrant attempting to authorize the seizure of instrumentalities of the crimes of a) failing to file the application for registry-wagering, and, b) failing to pay the \$50.00 occupational tax, the private records of the Petitioners were seized from an apartment at 2300a State Street, East St. Louis. They consisted of:

(A) A daily record listing the name of each bettor, the amount that was bet, what payment was due to the bettor, if any, and the net profit or loss on each transaction, together with a total of all bets received for a particular day, and the profit or loss for each day for March, April and May 1 to 4, 1957;

(B) A record of the gross profit of the business for each month that Petitioners were in the business;

(C) Bet slips and race results, and a recapitulation of all layoff bets placed with them by each layoff bettor for the month of April and May 1st to 4th inclusive of 1957 (none were seized for the month of March);

(D) Paid telephone bills.

Information from these records was presented to the Grand Jury which indicted them, not for the charges set out in the search warrant, but for attempting to evade the 10% tax on wagering; conspiracy to commit that crime, and the making of false statements to Internal Revenue Agents.

This case stands "on all fours" with an income tax evasion case, since it is prosecuted under the same section of the Code, 26 U. S. C. 7201.

Petitioners' rights under the IV and V Amendments to the Constitution were violated since the private papers constituted at most only evidence of the crimes charged in the Indictment. If the papers seized can be held to be the means of committing an offense of attempting to evade the 10% wagering tax, then any person subject to the income tax is liable to have all his papers ransacked and his home or business invaded under the purported authority of a search warrant. If the lower court was right in saying that these were papers that could be seized because they came under the "required records exceptions," then every person in the United States who is subject to the income tax law, or any other tax imposed by the Internal Revenue Code, is also subject to having his private papers seized under the same exception, even though, as in this case, the crimes alleged in the search warrant had not, in fact, been committed.

The Petitioners had been engaged in the wagering business for approximately four years prior to the seizure of May 6, 1957, and each year they filed their application for registry-wagering, and paid the \$50.00 occupational tax. In their registration, they stated that they were partners, along with James Prindable, doing business as North Sales Company, and that they operated "at large" and that Charles Kastner was their agent. Wagering stamps were issued to them pursuant to this "at large" application. Approximately 4½ months prior to the seizure Petitioner, Clancy, informed Internal Revenue Agent Buescher that they had no particular place of business, and the address, 2401 Ridge Avenue, was the address of his personal residence. Petitioner Clancy filed monthly reports of the wagers received by North Sales Company, and paid the tax reported to be due thereon. Internal Revenue Agents observed Charles Kastner and James Prindable entering a door leading to the premises at 230a State Street on several occasions, and on one occasion "Jim" entered this

door carrying a canvas sack similar to sacks furnished by banks to carry money. Principally upon this information, the Internal Revenue Agents applied for a search warrant for the premises.

1. We say that the Government had no probable cause for believing that the crimes alleged in the search warrant were being committed in the apartment at 2300a State Street. The only logical conclusion from the facts was that the partnership of the North Sales Company was operating at that location on the various days.

2. However, even if there had been probable cause—which we deny—there could not have been any authority to seize anything under the authority of the search warrant because: (a) the crimes alleged in the search warrant had not, in fact, been committed, therefore, there could be no instrumentality of a crime not committed; and (b) it was a general warrant and called for the seizure not of instrumentalities of a crime, but of evidence to prove the commission of a crime, which is prohibited, **Harris v. U. S.**, 331 U. S. 145, and (c) there are no instrumentalities for failing to register and pay the tax, since these are only crimes of omission and not commission. Only the failure to act would be the means by which these crimes could be committed.

3. Before Agent Kienzler executed the search warrant he was informed by Petitioner Kastner that the North Sales Co. was operating at this apartment and that they had a stamp. Kienzler was apparently satisfied that no crime was committed because Kastner nor anyone else was arrested. Therefore, the seizure of the property in this case could not be justified as incidental to an arrest as in **Abel v. U. S.**, ... U. S. ..., 80 S. Ct. 683. When Kienzler determined that the crimes alleged in the search warrant had not been committed, he should have left the premises immediately. Nonetheless, he proceeded to conduct an

exploratory search of the whole apartment for evidence of some other crime as condemned by this court in **U. S. v. Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420.

4. The seizure of a man's private books and papers and their use in evidence against him is not substantially different from compelling him to be a witness against himself, and this seizure and use in evidence of Petitioners' records in this case is a violation of their rights under both the IV and V Amendments to the Constitution of the United States. **Boyd v. U. S.**, 116 U. S. 616. This court held in **U. S. v. Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420, that where a man's papers were wanted by the officers solely for use as evidence of a crime of which he is suspected, that the papers could not be lawfully searched for and taken even under a search warrant: (A) issued upon ample evidence; (B) precisely describing such things; and (C) disclosing exactly where they were. This case is governed by the rules laid down in **Boyd** and **Lefkowitz**.

A.

1. Rule 41 (b) of the Federal Rules of Criminal Procedure, which provides that property may be seized which is the means of committing a crime, must be construed so as not to conflict with the property protected from compulsory seizure by the IV and V Amendments and the decisions of this Court defining these rights, otherwise it is unconstitutional. The only property which may be seized under the authority of a search warrant is that which is the instrumentality for the commission of the crimes alleged therein. **Harris v. U. S.**, 331 U. S. 145. This, of course, presumes that a crime has been committed. In the instant case, since the crimes alleged in the search warrant had not in fact been committed, there was no authority to seize any property.

2. Since the crimes alleged in the search warrant were the failure to register and the failure to pay the occupational tax, nothing could be seized since these are crimes of omission and not commission and there can be no instrumentality for the commission of a crime of failing to act.

3. Petitioners had complied with all federal laws requiring registration of their wagering business and had paid the occupational tax. Their conduct of the wagering business constituted the violation of no federal crime and only an instrumentality of committing a crime against the United States is contemplated by the language of Rule 41 (b) (2), Federal Rules of Criminal Procedure. (*Conyer v. U. S.*, 80 F. 2d 292), and possession of these records was not prohibited by federal law.

4. Even if the books and records of Petitioners were the instrumentalities for committing the crime of attempting to evade the payment of the 10% wagering tax—which we emphatically deny—they still would not be subject to seizure for two reasons: 1) they are not the means of committing the crimes alleged in the search warrant—these crimes were not in fact committed—and, 2) they were not even purportedly seized as incidental to an arrest.

5. We say that the instrumentality for the commission of the crime of attempting to evade the payment of the wagering tax for March, 1957, was the false return for that month which was filed on April 26, 1957. "Means" is the instrument or agency through which an end or purpose is accomplished. The wagering tax, like the income tax, is a self-assessed tax and is based upon information supplied to the government. This false information could be supplied whether the Petitioners' records were in existence or not. Once the false information is filed, the crime is complete and their records are simply evidence of whether they have reported falsely or not.

6. Although we have discussed the property of the Petitioners under the general term of private books and records, and we have proved that none of them were subject to seizure and use in evidence against Petitioners, this is a greater burden than we need assume. If any of the papers were not subject to seizure and use in evidence, then this case must be reversed. Our position is that none could be so classified. Certainly, however, the records for April and May compiled **after** the alleged false report for March had been filed were not instrumentalities of any offense in the indictment. They were not even evidence, nor can the bet slips for April and May recorded **after** the filing of the alleged false return be considered the means of committing an offense that had already been committed.

B.

The lower court held that the records of Petitioners were not protected from seizure and use in evidence against them because they were "records required to be kept by law." As authority for its holding, the court relied on **Shapiro v. U. S.** 335 U. S. 1. We say that the holding in **Shapiro** is limited to the facts in that case and is not controlling here.

1. We say that the case which is controlling on this point is **Boyd v. U. S.** 116 U. S. 623. In **Boyd**, the respondents record was sought to be obtained by compulsory process in order to prove his guilt of a fraud upon the revenue. Although the record was "required to be kept by law", this court held that it was a private paper and subject to the protection of the IV and V Amendments, and that it saw no difference between seizing a man's private papers to be used against him and compelling him to be a witness against himself.

2. The **Shapiro** case, which held that the records required to be kept by the Emergency Price Control Act

were public records is not controlling here because of these fundamental differences with the case at bar:

A. The **Shapiro** case rose out of the wartime powers of the government where the O. P. A. Administrator was given absolute power to regulate or prohibit businesses, in the public interest, for the successful prosecution of the war. The wagering business is not a subject of governmental regulation. The wagering act was passed as a revenue measure and its constitutionality was upheld on this ground. **U. S. v. Kahriger**, 345 U. S. 22.

B. In **Shapiro**, the keeping of records was absolutely essential for the regulation of the businesses subject to the act for the purpose of enabling the administrator to issue regulations, orders and price schedules. In the instant case, the only purpose for requiring records to be kept was to determine whether or not a person had paid the correct amount of tax, just as in the case of income tax, which is governed by the requirements of the same Section, Title 26 U. S. C., Sec. 6001.

C. In **Shapiro**, the court found that the keeping of records was for the benefit of the public, since these records established the price to be charged to the public. In the instant case, the records were not kept for the benefit of the public. They contained information relative to income tax and while subject to inspection by an Internal Revenue Agent, the information was private and confidential and the disclosure of it to the public made the agent liable to imprisonment. 26 U. S. C., Sec. 7213, 18 U. S. C. 1905.

D. In **Shapiro**, before a person subject to the act could engage in business, it was necessary that he obtained a license which was subject to suspension. In the instant case, no license was required, and in fact, the government was not authorized to license this business, nor did it pur-

port to. The wagering stamp itself stated that it was not a license.

3. Records do not become public records simply because they are required to be kept by law. In **Shapiro**, this court listed some 25 federal acts which they considered to be governed by the rule laid down, however, at no point was the Internal Revenue Act listed. The Petitioners were not custodians of their records for the benefit of the public, but they were the owners who maintained them for their own purposes, of conducting their business.

4. Title 26 U. S. C., Sec. 6001 requires every person liable for either the payment or the collection of any tax imposed by Title 26, the Internal Revenue Code, to keep such records as directed by the Secretary of Treasury. The lower courts ruling allows the Secretary of Treasury, or his delegate, the right to exclude papers from the protection of the IV and V Amendments by the simple device of enacting a regulation requiring that they be kept. By the administrative act of classifying, the Secretary of Treasury could destroy the right of private ownership of papers. This would authorize the amendment of the Constitution by executive fiat. This is truly the situation feared in the **Boyd** case of placing the liberty of every man in the hands of every petty officer.

II.

The Government has conceded in its brief opposing Certiorari that government agent-witnesses' reports come within Title 18, Sec. 3500 and this position is supported by the Second, Third, Fourth and Eighth Circuits, and now in the Seventh Circuit, which within three weeks after having denied Petitioners' Petition for Rehearing in this case completely abandoned the criteria which is set out in its opinion in the instant case, and substituted

the requirements of the statutes, to-wit: (1) that the witness must have testified on direct examination; (2) that the demanded report must relate to the subject matter of his testimony; (3) that the report must be written or otherwise approved or adopted by him. **U. S. v. Berry**, 277 F. 2d 826; **U. S. v. Sheer**, 278 F. 2d 65.

Government agent-witnesses Minton, Buescher and Moehel each admitted they wrote a report and that it concerned their testimony on direct examination. A demand, pursuant to the statute, was made and refused by the trial court on the ground that these reports were not made contemporaneously with the interviews they recorded. The Trial court, despite the fact that all the requirements of Subsection (e) (1) had been met, insisted on requiring that the requirements of Subsection (e) (2) also be met, which would have been applicable if the person interviewed had testified, but certainly not applicable where the government agent who made the written report was, himself, the witness.

Clearly, these reports are within the statute, and the refusal to order production was error which was highly prejudicial to the defense. The testimony of these witnesses not only went to sustain the proof of Counts I, II and III of the Indictment, which charged the Petitioners and Defendant Prindable with making false statements to government agents, but to Subparagraphs 2, 3, 4, 5, 6 and 7 of Count IV (R. 28 and 29), and each overt act alleged in Count V as well.

Petitioner Kastner's defense throughout the trial was that he was not, in fact, a partner, but merely a clerk. One witness for the Government described him as a "ribbon clerk", and Kastner so described himself as a clerk on the day of the raid when he signed the receipt as clerk for the articles seized. This agent, witness Minton, in his testimony stated that Kastner stated he was a

junior partner, a clerk and a partner. Certainly, on an issue this serious it was important that the defense be able to see what the report of the government agent actually stated. For if Kastner was, in fact, a clerk, he could not have been found guilty under Counts IV and V. **Ingram v. U. S.**, 364 U. S. 672, 79 S. Ct. 1314.

It was important to the adequate defense of these petitioners, to have been granted the clear right under the statute to have the reports produced for purposes of possible impeachment of these witnesses. Only the defense could have determined the effective use that could have been made of these reports. It was prejudicial error of the grossest sort not to order production.

ARGUMENT.

I.

The Rights of the Petitioners Under the IV and V Amendments to the Constitution of the United States Were Violated by the Seizure of Their Private Books and Records, and Subsequent Use in a Criminal Prosecution Against Them.

This is a case where it is impossible for us to feel that the admitted occupation of the Petitioners as gamblers did not influence the trial and lower court in holding, in effect, that the IV and V Amendments of the Constitution of the United States did not protect these Petitioners. No matter how unsavory the business of gambling may be to some, the fundamental principles of constitutional protection cloak the professional gamblers as well as the doctors, lawyers, and all those professions recognized as honorable.

Petitioners were indicted for and found guilty of a violation of 26 U. S. C., Sec. 7201. Historically, this is the charge used to prosecute persons who attempt to evade the payment of income tax. Indeed, we say that this is similar in all respects to an income tax evasion case. The constitutional protection of records should, therefore, be the same in both cases. Nonetheless, the lower court held that the Petitioners' records ordinarily and customarily used by them in carrying on their wagering business were not protected by the guarantees of the IV and V Amendments because they were: a) instrumentalities of the crime of attempting to evade the payment of the wagering tax; and, b) were records "required to be kept by law." It held that all records "required to be kept by law" under the provisions of 26 U. S. C., Sec. 6001, which is the general record-keeping requirement applying to all persons who are liable for income tax, were not protected by the IV and V Amendments.

If the decision in this case is sound law, then every home, and dwelling, every business, large and small, every citizen, no matter how little or how big, is subject to an invasion by the Internal Revenue Department under the guise of a search warrant to seize any and all records that might relate to their income tax and tend to prove a violation thereof. For there is no rule of law announced in this case which would not be applicable to an income tax case.

The Government has never contended before that the private records of a citizen can be seized, and information contained therein be used to indict and convict him of attempting to evade the payment of income tax. Yet the contention is made in this case, since no valid distinction can be made between the facts in this case and a typical income tax violation.

We submit that the lower courts by the simple device of attaching labels have completely stripped from these Petitioners the protection of the IV. and V Amendments.

In order to understand how the constitutional rights of these Petitioners were violated, it is essential for the clear presentation of this argument to examine in some detail the facts surrounding the search and to examine in detail the property seized.

1. The Unreasonable Search and Seizure.

Before the commencement of the search on May 6, 1957, the Internal Revenue Department knew:

That the Petitioners and James Prindable had been engaged in the wagering business for approximately 4 years immediately before this seizure; that for each of these years they had registered as required by 26 U. S. C., Sec. 4412, and paid the \$50.00 occupational tax as required by 26 U. S. C. 4411, and were issued wagering stamps in all three names (Defendants' Exs. 1 and 2, R. 158); that their registration (U. S. Exs. 11-14, R. 85) stated that they

operated as a partnership under the name of North Sales Co.; that they operated "at large" and that Petitioner Clancy's residence address was 2401 Ridge Avenue (R. 100); that Charles Kastner, Jr., was an agent accepting wagers in their behalf; that Petitioner Clancy filed and signed their monthly reports of wagers and paid the tax reported to be due thereon for each month of the fiscal year 1956-1957 (U. S. Exs. 1-10, R. 84); that James Prindable and Charles Kastner, Jr., who also had a wagering stamp, were described as well known bookmakers and had been seen entering the door leading to the apartment at 2300a State Street, East St. Louis, on several occasions, and that on one occasion "Jim" entered the door leading to the apartment carrying a canvas sack similar to sacks furnished by banks to carry money.

It was principally on the information of Prindable and Charles Kastner, Jr., entering these premises, and that they both had wagering stamps that the search warrant was issued. When the warrant was issued, Special Agent George Kienzler took the search warrant to the apartment at 2300a State Street to execute it. When he arrived, and before he executed it, he was confronted by Petitioner Kastner who informed him that North Sales Co. was operating there and that they had a stamp. With actual knowledge of the facts contained in the affidavits for the search warrant and the constructive knowledge of the information on file in the Internal Revenue Office, Agent Kienzler's enthusiasm was still undiminished.

He began rummaging through the buffet and drawers to see what he could find. At no time on that day, while he or any other agent was on the premises, and either before or after the search was any arrest made. He found no contraband, nor any property whose possession was prohibited by federal law. He did find the private books and records of the Petitioners used by them to conduct the wagering business. Lest he leave empty handed, he seized

them. These same private books and records were presented to a Grand Jury which indicted the Petitioners and Prindable. Some of the same papers were introduced into evidence by the government upon identification by Agent Kienzler. Another agent, Mochel, testified at the trial that he examined them in order to determine the manner of bookkeeping, and then made a computation from them of the amount of wagering tax due the U. S. by the Petitioners for the month of March, 1957. This amount was identical with the amount alleged in the indictment.

2. Property Seized.

1. Petitioners' daily record of: wagers received; the amount won or lost to each person; the profit or loss on each transaction; and, the profit or loss for each day, for the month of March, 1957. These records were listed in the return of the search warrant and were seized from the lower right-hand part in the buffet in the apartment at 2300a State Street (R. 89). This is a receipts and disbursement journal ordinarily used in any business.

They were marked as U. S. Exs. 54-79 (R. 90) and introduced into evidence upon the testimony of Agent Kienzler who seized them (R. 90) during the course of a three hour search (R. 21). Agent Mochel testified he examined and studied them, and that he made a computation in regard to them; that they were dated for the month of March, 1957, and are dated consecutively with the exception of Sundays; that he totaled them and that each carried a total at the bottom of each particular sheet (R. 143); that he prepared worksheets which disclosed the totals of the column with respect to those sheets for the month and prepared a worksheet which is Government's Exhibit 115 (R. 144 and R. 146); that according to his computations, the gross wagers accepted for the month of March, 1957, was \$103,441.30 and that the Petitioners had only reported the amount of

\$11,913.50 on the monthly return filed by them for March, 1957, which was U. S. Ex. 9. [These identical figures were alleged in the Indictment (R. 27).]

2. Petitioners daily record of wagers received by Petitioners for the month of April and for May 1, 2, 3, and 4 of 1957. These records were identical to the records listed in Paragraph 1, however, they were for a different period of time. These records were introduced into evidence as U. S. Exhibits 80 through 109 (R. 90-91), and were obtained from either the bottom drawer of the sewing cabinet, or a drawer of the buffet (R. 22-23). Agent Mochel examined U. S. Exhibit 108 and U. S. Exhibits 111 to 111SSS inclusive (R. 144) in order to determine the Petitioners' manner of bookkeeping.

3. A record of gross profit for the North Sales Company prior to distribution to layoff bettors (U. S. Ex. 110) (R. 91).

4. A package consisting of a racing form wrapped around the results of races run the same day, and bet slips for May 3, 1957. The cover of the package was marked as U. S. Exhibit 111 (R. 92) and the contents were marked as U. S. Exhibit 111A to 111SSS (R. 129). The contents were identified by Charles Kastner, Jr. as records of the individual wagers accepted by North Sales Company for May 3, 1957 and bet slips and a recapitulation of bets placed by the various bettors (R. 126-128). Agent Mochel testified that these were bet tickets for May 3, 1957 (R. 144), which he also examined in order to determine the manner of bookkeeping of Petitioners'.

N. B. There were no bet slips seized for the month of March, 1957.

5. A Gordon's Dry Gin carton marked U. S. Ex. 112 (R. 92) which was admitted into evidence on the ground that it was in the same condition at the time it was seized, and which contained 28 racing forms bound into packages

and with contents similar to U. S. Ex. 111. These racing forms were for the month of April, 1957 and for May 1st, 2nd and 4th, 1957.

6. Paid telephone bills which were admitted as U. S. Exhibits 30-53 upon the testimony of Agent Mueller that they were seized by Agent Kienzler and turned over by him to Agent Hudak, who, in turn, delivered them to Agent Mueller (R. 110).

7. Cash and various other papers.

3. Rights Under the IV and V Amendments.

The compulsory seizure of private books and papers of the Petitioners to be used as evidence in a criminal prosecution is prohibited by both the IV and V Amendments, and constitutes an unreasonable search and seizure. **Boyd v. U. S.**, 116 U. S. 616.

Since the crimes alleged in the search warrant had not, in fact, been committed, the private papers of Petitioners were wanted by the Internal Revenue Agents solely for use as evidence of some other crime, and they could not be lawfully searched for and taken even under a search warrant issued on ample evidence and precisely describing such things and disclosing exactly where they were. As this court said in **United States v. Lefkowitz**, 285 U. S. 452, 464:

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. **Gouled v. United States**, 255 U. S. 298, 310, 41 S. Ct. 261, 65 L. Ed. 647."

Although the **Boyd case** is a precedent of many years standing, this court in its last term restated the rights of

an individual under the Fourth Amendment to have evidence obtained by an illegal search excluded in a criminal prosecution regardless of who conducted the search and seizure. **Elkins v. U. S.**, 80 S. Ct. 1437.

This court also stated in the **Elkins case** at page 1444;

“Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. **Brinegar v. United States**, 338 U. S. 160, 181, 69 S. Ct. 1302, 1313, 93 L. Ed. 1879 (Dissenting opinion).”

This court recently said in **Abel v. U. S.**, ... U. S. ..., 80 S. Ct. 683, that “the preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.” The rights of individuals under the IV and V Amendments are to be liberally construed in his favor. **Gobart Importing Co. v. U. S.**, 282 U. S. 344.

It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachment thereof. **Smith v. People**, ... U. S. ..., 80 S. Ct. 215.

Certainly, the language of the Fourth and Fifth Amendments leave no room for inference that invasions of these rights can be made just because they are slight. The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and the language “shall not be violated” is a prohibition imposed equally upon the judicial, the legislative and executive branches of our government.

The Fifth Amendment provides that “no person ... shall be compelled in any criminal case to be a witness against himself.” This amendment does not say “some persons”, but says “no person”, and applies with equal

force upon all citizens regardless of their occupation. These Amendments are the supreme law of the land, and have thus fixed their own value of freedom from unreasonable searches and freedom from being a witness against ones self in a criminal proceeding. This is the manner in which this Court discussed the constitutional rights under the I Amendment in **Smith v. People**, ... U. S. ..., 80 S. Ct. 215.

Furthermore, there was another reason why the Petitioners' rights under the IV Amendment were violated. The agents in their affidavits stated knowledge of facts which showed that they could not have drawn the conclusion: that the crimes of failing to register and failing to pay the \$50.00 occupational tax were being committed on those premises. There was nothing in the affidavits of the agents that would have warranted the conclusion they drew. They admitted that they checked the registry (U. S. Ex. 14), and Prindable and Kastner both had stamps (R. 50). The registration which they checked showed the application was an "at large" application. The registration also showed that Prindable was operating as a principal of North Sales Company, and Kastner as an agent; the affidavits showed that they both entered the premises at 2300a State Street within 8 minutes of each other on May 1, 1957 (R. 15), and that on another occasion "Jim" entered the premises carrying a canvas sack similar to sacks furnished by banks to carry money.

The only irresistible conclusion that can be drawn from these facts would be that the North Sales Company was operating, those days from that location. Certainly, when all the facts lead to the opposite conclusion, the agent cannot state that he believes the crime is being committed and have a valid warrant issue on the basis of the affidavits. This point was raised on the Motion to Suppress the Evidence and Return the Property; however, the court overruled the Motion.

A.

Books and records customarily kept by petitioners in their business of accepting wagers on horse races where they have filed an application for registry-wagering, paid the \$50.00 occupational tax, received a wagering stamp, filed monthly reports of wagers accepted by them and paid a 10% tax on wagers so reported are protected by the Fourth and Fifth Amendments to the Constitution of the United States from search and seizure for the purpose of being used in a criminal trial against them, on the grounds that said books and records are merely evidence of an offense as opposed to being property used as the means of committing a criminal offense as provided in Federal Rules of Criminal Procedure, Rule 41 (b) (2).

1. The Motion to Suppress Evidence and to Return Property.

a) **Trial Court.** After the Petitioners were indicted, they filed a timely Motion to Suppress the Evidence and to Return the Property seized, alleging among other things that the search was unreasonable and in violation of their rights under the IV and V Amendments. They were persons who had standing to complain as in **Rios v. U. S.**, ... U. S. ..., 80 S. Ct. 1431. This Motion was supported by an affidavit, exhibits and stipulation. The Government stipulated that some of the information taken from the books and records seized was presented to the Grand Jury which indicted Petitioners (R. 41) and that the exhibits which were attached to the brief could be admitted into evidence. These were photostatic copies of their application for registry-wagering for the fiscal year 1956-1957, and the wagering stamp issued by the Internal Revenue Department for the same period of time. Nonetheless, the trial court overruled this motion on the ground that "the items seized under the authority of the search warrant were used and intended to be used as a means of

carrying on the attempt to defeat and evade the excise tax and thus must be considered as instrumentalities in conducting the illegal operations" (R. 52). The holding of the court restated was: that although the Petitioners were conducting the wagering business with the knowledge and consent of the Internal Revenue Department, because their private books reflected a larger amount of wagers for March, 1957 than reported to the Internal Revenue Department on U. S. form 730, that this made the operation of their business illegal, and their books and records, instrumentalities for conducting this business.

This is similar to and prosecuted under the same section (Title 26, U. S. C. 7201) as all income tax fraud cases. The holding of the court, logically extended to an income tax case, would be that if a person attempts to evade the payment of income tax, and if his records used to conduct his business are accurate and they furnish proof of his fraud—then his business is an illegal operation, and the books used by him to conduct his business are instrumentalities used to conduct an illegal operation, and are not protected by the IV and V Amendments. This holding is erroneous, and it is obvious that the court would not have so ruled if any other business, except gambling, was involved.

b) **Circuit Court of Appeals.** In affirming the trial court's ruling on the Motion to Suppress, the Court of Appeals used a different ground. They did not hold that the private books and records were the instrumentalities in conducting an illegal operation. They obviously recognized that the operation of the Petitioners' wagering business was not an "illegal operation" under federal law. However, they have one thing in common with the lower court—the desire to punish these gamblers who violated the law of Illinois, despite the implicit holding of this court in **U. S. v. Kahriger**, 343 U. S. 22, that Congress had no right to prohibit the wagering business. The court held

that these books and records were "gambling paraphernalia" used in the commission of a crime in violation of 26 U. S. C. 7201, i. e., knowingly attempting to defeat and evade the wagering tax, and were, therefore, subject to seizure (R. 229), even though this was not a crime alleged in the search warrant.

In rationalizing its holding the court, intent upon its dedicated purpose, decided that only evidence of an intention to commit a crime or malum in futuro was protected by the IV and V Amendments, totally in disregard of this court's holding in **U. S. v. Kahriger**, 345 U. S. 22, that the V Amendment applies to past acts and not to crimes that may or may not be committed in the future.

The adoption of the label "gambling paraphernalia" is a dramatic example of how error is created by lifting words out of context. In **Gouled v. U. S.**, 255 U. S. 298, 41 S. Ct. 261, 265, the court, in citing what paper might be considered an instrumentality for committing a crime, said:

" . . . Lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth v. Dana*, 2 Mete. (Mass.) 329. . . . "

The same circuit that decided this case cited the **Gouled** case in its opinion in **U. S. v. Thompson**, 113 F. 2d 643, stating what property had been held to be instrumentalities for the commission of a crime cited " . . . and lottery tickets . . . " without the qualifying words, "under a statute prohibiting their possession with intent to sell them," and without citing the state court decision showing it arose under state law.

If gambling is not prohibited by federal law, then "gambling paraphernalia" cannot be the instrumentalities for the offense of a violation of 26 U. S. C. 7201 any more than the shoes, hats and merchandise of haberdashery or "mercantile paraphernalia" can be considered the instrumentalities for committing a crime under the same section

if the haberdasher attempts to evade the payment of his income tax.

Without stating it, the court apparently relied for its authority on the provisions of Rule 41 (b) (2), Federal Rules of Criminal Procedure, which provides for the seizure of property which is the "means of committing a crime." However, the crime referred to must be a crime under one of the Federal statutes, **Conyer v. U. S.**, 80 F. 2d 292, and may not be for a crime under the law of an individual state.

Although the lower courts do not deny the privilege against compulsory production of private papers as declared in the **Boyd case**, they have striven hard to classify these private papers of the Petitioners as the "means" of committing a crime. They have attempted by applying a label of "instrumentalities" to these particular papers to find some reason why these constitutional privileges are not available to the Petitioners. The effect of their holdings is to repeal these amendments. The problem here is not what you call these papers, but whether they were (1) private, (2) seized by compulsory process and over objection of their owner, and (3) were solely evidence to prove the guilt of their owner. All three of these requirements are met here and, regardless of what they are called, their use is no different from compelling a man to be a witness against himself, and constitutes a violation of his rights under the V Amendment. The rights of partners in partnership papers are the same. Black's Law Dictionary, 3rd Edition, defines "means" as follows: "The instrument or agency through which an end or purpose is accomplished." What then were the instrumentalities for committing the crimes charged in the a) search warrant and b) the Indictment?

2. The Search Warrant.

a) The Court issued a search warrant purportedly authorizing any special agent of the Internal Revenue De-

partment to seize from that place property described in the warrant and which was designed and intended for use, which have been and are used in the conducting and carrying on of said wagering business on said premises, and designed and intended for use and which have been and are now being used as a means of committing divers criminal offenses against the laws of the United States—which were wilfully attempting to evade and defeat a tax of \$50.00 on anyone engaged in the wagering business (26 U. S. C. 4411) and wilfully failing to prepare and file a special tax return and application for registry-wagering (26 U. S. C. 4412).

Agent Kienzler, who executed the warrant, entered the premises on the purported authority of the search warrant to seize the instrumentalities, if any so described, for committing the crimes alleged in the search warrant. No property which was merely evidentiary whether described in the warrant or not, could be seized. **Harris v. U. S.**, 331 U. S. 145.

The authority for seizing the instrumentalities of a crime presumes that a crime has been committed. Since the crimes alleged in the search warrant were not, in fact, committed on these premises by Petitioners or anyone else, Kienzler had authority to seize nothing. The Petitioners were not prohibited by federal law from engaging in the wagering business, and the possession of property used by them to conduct this business was not a crime against the United States. Kienzler made no arrest, no crime was committed in his presence, and there was no possession of contraband. Therefore, there was no right to seize any property.

b) Furthermore, the crime committed by a person who engages in the wagering business without registering and paying the tax is his failure to register and to pay the tax, and not his engaging in the business without first having paid it. The violations alleged in the search

warrant are crimes of omission and not of commission. Therefore, even had the Petitioners not registered, nor paid the tax, the search warrant called for the seizure of all records which were evidence and not instrumentalities. The warrant was in effect a general warrant. It is difficult to understand how any property may be used as a means of committing a crime of omission. Indeed, we say that no property can be used to commit these crimes. Once those engaged in gambling operations have begun wagering without registering and paying the special tax, their omissions become past acts and any property used in gambling would, of necessity, be employed after the omissions. The property becomes merely evidence of these omissions and is not used for the commission of these offenses. The possession of such property is not a federal crime, and does not constitute the instrumentalities and means by which any federal crime was committed. This is made clear when we consider the nature of the offense here involved. The Gamblers' Occupational Tax Act did not place a license upon gambling. Rather, it imposed a tax and certain registration requirements in connection with gambling activities. Implicit in **United States v. Kahriger**, 345 U. S. 22, which upheld the validity of the Act, is the premise that Congress had no power to regulate the business of gambling as such.

3. The Indictment.

Since no legal arrest was made in this case on the premises, the seizure must depend upon the authority of the search warrant. It is impossible, therefore, to reconcile the opinions of the lower courts authorizing the seizure of evidence of a crime totally different from that alleged in the search warrant. Nonetheless, it is inconceivable that the private books and records which were seized could be the instrumentalities for the crimes alleged in the Indictment.

The crime alleged in the Indictment was the wilful attempt to evade the payment of the 10% tax imposed on wagers (26 U. S. C. 4401) accepted by Petitioners during the month of March, 1957. By what means was this crime allegedly committed? Obviously, by filing false returns at the office of the Collector of Internal Revenue and misrepresenting the amount of tax actually owed, and no foray into the field of tortuous semantics can change this obvious fact.

How can it reasonably be said that books and records revealing the true state of the wagering business could be the instrument by which the purpose of evading the tax is accomplished? The only purpose of these books and records would be evidence to show the true and actual amount due, that is, evidence that the instruments or means previously used were false and corrupt.

If the false monthly report is filed, the crime is committed. The instrumentality or agency is in existence when the false report is prepared and sent to the Collector. If a false report is not filed, there is no crime accomplished. In both instances, the books and records serve the same capacity to prove or give evidence to the fact that the report is false or give evidence to the fact that the report was correct. In either case, they only exist as evidence. If there had been no books and records maintained, there still would have been a crime committed of attempting to evade the tax, but without the filing of the false report, the crime charged would not come into being.

If the government had made its proof by the books and records of the individual tavern owners, or by their oral testimony as to the amount of bets they allegedly laid off with the North Sales Co., would it seriously contend that the books and records of the tavern owners, or their oral testimony, was the instrumentalities of the offense? The wagering tax, just as the income tax, is a

self assessed tax. Persons who are subject to this tax, after registering and obtaining a stamp are supplied forms by the Internal Revenue Department, which have the name of the taxpayer and his wagering stamp number printed on them (U. S. Exs. 1-10). The taxpayer is required to fill out the blanks on the government forms and report the amount of wagers accepted by him (Int. Rev. Reg. 325.25 (a)). He computes the amount of tax due and forwards the form along with his check for the tax to the District Director of Internal Revenue. Therefore, if there was any attempt by these Petitioners to evade the payment of the tax, this was accomplished by inserting false information on the government form, mailing the same and thereby decreasing their liability, and necessarily the instrumentality for wilfully attempting to evade the payment of wagering tax in this case would be the filing of the false monthly report, U. S. Form 730 (U. S. Ex. 10).

A case very similar to the case at bar was **Takahashi v. U. S.**, C. C. A., 9 Cir., 143 F. 2d 118. In that case, the defendants were charged with a conspiracy to violate an executive order by designating China as a country of destination on an application for a license to export certain storage tanks, when, in fact, Japan was the country of ultimate destination, and they were also charged with making false and fraudulent statements in an application in a matter within the jurisdiction of the Department of Justice. They moved to suppress certain documents seized by custom officers including code telegrams, letters, and other documents that indicated that the destination of the tanks, to be exported, was not China, and that the real purpose was to deliver the tanks to Japan. The Court of Appeals in holding that the motion to suppress should have been sustained by the trial court overruled a contention that the papers were more than mere evidence, but were themselves the instrumentalities of a crime. The court held that while the application for the

license, itself, would be an instrumentality for the commission of a crime, the tanks themselves and the papers taken from defendants were mere evidence of an intention to commit crime under both the substantive counts.

This Court in the case of **U. S. v. Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420, condemned the practice of conducting a general exploratory search of the premises incidental to the arrest of the defendant. After the arrest was made, the prohibition agents who accompanied the Deputy Marshal opened all the drawers of the desks located in the premises, examined their contents, and took therefrom and carried away books, papers and other articles. They also searched the towel cabinet and took papers from it along with contents of the baskets. The court in holding that the search and seizure was unreasonable said that the papers which were seized were not contraband as in the case of **Carroll v. U. S.**, 267 U. S. 132, 45 S. Ct. 280. This Court said in **Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420, 423:

"The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrest. And that must be decided on the basis of valid arrest under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondent's guilt of crime, **whether that specified in the warrant or some other offense against the Act.** Their conduct was unrestrained. The lists printed in the margin show how

numerous and varied were the things found and taken" (Emphasis supplied).

That case is also similar to the case at bar in that the crimes alleged in the search warrant were not committed by the defendants, and no crime was committed in the presence of the searching officers for which an arrest was made.

In **Gould v. U. S.**, 255 U. S. 298, this Court reasoned that the purpose for allowing the seizure of property was to prevent the commission of a future crime by the use of the instrumentalities seized. We say that this purpose would be the same in a seizure under authority of a search warrant or as incidental to a lawful arrest.

It is clear that the seizure in this case, when measured by that purpose, falls short. The seizure of the private books and records of the Petitioners did not, nor could not, prevent the future commission of crimes alleged in the search warrant, i. e., failing to register and pay the \$50.00 occupational tax. The Petitioners could not have committed these crimes at the time of the seizure by any means—since they had already complied with this federal statute in this respect, and because their records were merely evidence of their operation for past months.

Likewise, since the attempt to evade the payment of the 10% tax alleged in the indictment was committed by furnishing false information on government forms—the possession of Petitioners' books and records were not necessary, or a means by which this fraud was accomplished.

To this point, we have referred to all of the property seized by the Government as the private books and records of the Petitioners, and while we say that none of the Petitioners' property was subject to seizure, this is a greater burden than we are required to assume for the purpose of showing that reversible error has been com-

mitted. If any of the property seized and introduced into evidence was in violation of the Petitioners' rights under the IV and V Amendment, then this case must be reversed.

Without abandoning our previous argument, we will now show how some of the property seized could under no stretch of the imagination be considered as instrumentalities for the commission of the crime of wilfully attempting to evade the payment of the wagering tax for the month of March, 1957.

1. U. S. Exhibits 54 through 79 (R. 91) were the records of the Petitioners for the month of March, 1957, showing the wagers received and the outcome of the individual bets. Each exhibit number was a record of the transactions for a particular day. The amount of wagers received by Petitioners was reported on Internal Revenue Service Form 730, and the report for March was filed on April 26, 1957. Therefore, the recording of the transactions of the day's business for March was actually completed some 26 days before the crime of attempting to evade the tax was committed by the filing of the false return. The compilation of these records had been completed before the crime was committed and were not used as a means of committing it.

2. U. S. Exhibits 80 through 109 (R. 91) were similar to the records in Paragraph 1 above, but they were for the month of April and May 1st, 2nd, 3rd and 4th of 1957. Even if this court would hold that the records for March of 1957 were instrumentalities for attempting to evade the tax for March of 1957, we do not see how records compiled subsequent to that time, and which reflect neither the correctness nor the falsity of the tax reported for March, could be considered as a means of committing that crime.

3. U. S. Exhibit 110 (R. 91) was a record of the gross profit of the North Sales Company for several years prior to the seizure and these do not in themselves constitute a

means by which the crime of attempting to evade the payment of wagering tax for March of 1957 could be accomplished.

4. U. S. Exhibits 111 and 112 (R. 92-93) were the bet slips for the month of April and May 2nd, 3rd and 4th of 1957, all of which were compiled subsequent to the month in question. Even if this court would hold that betting slips for the month of March, 1957 could be the means of committing the crime of attempting to evade the payment of the wagering tax for the month of March, 1957, we do not see how these records, which were compiled subsequent to the month in question, could be the means or instrumentalities for attempting to evade the wagering tax for a previous time. We also point out that these are not "records required by law to be kept", and their seizure, therefore, could not be justified on the alternative theory that they are records "required to be kept by law" and thus excluded from the protection of the IV and V Amendments.

5. U. S. Exhibits 103 to 109 inclusive (R. 90, 91) were records of the Petitioners' conduct of their wagering business for the period April 27th to May 4th inclusive. Therefore, since these records were compiled subsequent to the time that the false report of wagers for the month of March was filed by Petitioner Clancy on April 26, 1957, they were not in existence at the time of the commission of the crime. We say that under no theory can these be considered as instrumentalities for the commission of the crime of attempting to evade the wagering tax for March of 1957.

6. U. S. Exhibit 111 and 6 other packages contained in U. S. Exhibit 112 were the bet slips for the period April 27th to May 4th inclusive, and they were not in existence at the time of the commission of the crime. Even though this court would hold that the bet slips constituted an instrumentality for the commission of the crime of attempt-

ing to evade the wagering tax for March of 1957, or a conspiracy to do so, we do not see how these could possibly be the instrumentalities for the commission of a crime which was completed on April 26, 1957, by the filing of the false return. These records are not records "required to be kept by law" and would, therefore, not come within that theory. We further say that there could be no instrumentality for the conspiracy to commit a crime after that crime has been completed. The only possible way the conspiracy could exist after that time, if at all, would be by the concealment of the fact that the crime had been committed. We say that these are not the instrumentalities for any concealment, and are not even evidence of what has been concealed.

7. U. S. Exhibits 30 to 53 (R. 110) were paid telephone bills which were seized on May 6, 1957. We submit that these are not the instrumentalities for committing the crime of attempting to evade the wagering tax, and they are also not "records required by law to be kept".

We request the Solicitor General to inform this court why all of the above mentioned property was subject to seizure for use in evidence to prove Petitioners' guilt.

As we have pointed out above, the only purpose for the government seizing the records of the Petitioners was to obtain evidence to prove that they had wilfully attempted to evade the payment of the tax by showing the discrepancy between the records and the amount reported to the Internal Revenue Department and upon which the tax was paid. The property seized was not illegal to possess, nor was it contraband, nor were they records used to conduct a business prohibited by Federal law. They were merely records of a business which the Petitioners conducted with full knowledge and consent of the United States. The Fifth Amendment was enacted to assure a person that they would not have to furnish incriminating testimony against himself and, if it is to be abrogated, it should be

we would think by the procedure ^{up} in the Constitution, itself.

The effect of the lower court's ruling in holding that books and records used by persons engaged in a business not prohibited by Federal law are instrumentalities for the commission of the crime of attempted tax evasion has far reaching effects beyond this case. This holding is that if an individual is indicted for an attempt to evade the payment of any tax imposed by Title 26, then all of his private papers which prove his guilt are instrumentalities for the commission of that crime. As a result of this holding, all private rights are abolished under the Fourth Amendment to papers which prove the guilt charged and every document of an individual which in any way reflects upon the liability of any tax under the Internal Revenue Code, becomes a witness against the owner in violation of the guarantees of the Fifth Amendment.

B.

Records which are usually and customarily kept and which are required to be kept by persons engaged in a taxable wagering business under the provisions of Title 26, U. S. C., Sections 4403, 4423 and 6001, and Internal Revenue Regulation 132, Section 325.32 for the purpose of determining the correct amount of wagering and income tax due are private books and records and protected by the Fourth and Fifth Amendments to the Constitution of the United States.

It is conceded by the Petitioners that they were engaged in the taxable wagering business, and that as a result they were required to keep records of the amount of profits of their business and wagers accepted by them for the purpose of determining the correct amount of income and wagering tax due to the United States under the provisions of Title 26, U. S. C., Secs. 4403, 4423, 6001, and Internal Revenue Regulation 132, Sec. 325.32.

It is also agreed by the Petitioners and the Government that the books and records of the Petitioners which were seized under authority of a search warrant on May 6, 1957, were the records of their wagering business.

The court of appeals held that the books and records which were seized were not within the protection given to private papers by the Fourth and Fifth Amendments to the Constitution of the United States, but were records required to be kept by law, and came therefore within the "required records" exception (R. 229-230).

In **Boyd v. U. S.**, 116 U. S. 623, the most important search and seizure case in the history of this court, this court held that private books and records were not subject to compulsory production to prove the guilt of their owner. This was held, even though the seizure involved "required by law to be kept."

In discussing the compulsory production of private papers this court said in the **Boyd** case:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

The principle laid down in the **Boyd** case we believe to be controlling in the instant case, since both cases involve the compulsory seizure of the private books and records of the defendants, and which were "books required by law to be kept for inspection", and the seized papers were desired in both cases to prove that the owners thereof had

committed a fraud by attempting to evade the amount of tax owed to the United States.

Mr. Justice Frankfurter in his dissent in **Shapiro** said that the **Boyd case** speaks "loudly against the claim that merely by virtue of a record keeping provision the constitutional privilege against self incrimination becomes inoperative."

As authority for its holding, the lower court cited the following cases: **Shapiro**,¹ involving the exercise of war-time powers of the United States to regulate the price controls in the public interest; **Davis**,² involving the seizure of Government owned gasoline coupons; **Wilson**,³ involving the compulsory production of corporate records; **Smith**,⁴ which cited the **Beard case** as authority for its holding; **Beard**,⁵ upon which this court refused to grant certiorari on the representation that the Solicitor General, in opposing certiorari, argued: (1) that the constitutional question was not involved because the privilege was not claimed by the taxpayer, and (2) that he would not oppose certiorari if a case came up involving a straight declaration of refusal by the taxpayer to turn over books and records on the grounds that it was incriminating.⁶

Counsel respectfully submit that this is a case of first impression before this court, and that none of the cases cited by the lower court are authority for its holding. The principal case relied on by the Government is the **Shapiro case** which is authority for only the facts in that

¹ *Shapiro v. U. S.*, 335 U. S. 1.

² *Davis v. U. S.*, 328 U. S. 582.

³ *Wilson v. U. S.*, 221 U. S. 361.

⁴ *Smith v. U. S.*, 236 F. 2d 260 (8 Cir.), Cert. denied 352 U. S. 909.

⁵ *Beard v. U. S.*, 222 F. 2d 84 (4 Cir.), Cert. denied 350 U. S. 846.

⁶ *New York University*, 1957, *Institute on Federal Taxation*, edited by Henry Sellin, p. 1213.

case, and we say that a single decision by a closely divided court, unsupported by confirmation of time, cannot check the course of constitutional adjudication here. **Kovacs v. Cooper**, 336 U. S. 77, 69 S. Ct. 448, 454.

If this court decides that **Shapiro** is not limited to the facts in that case, and that it is authority for the proposition that all records required by law to be kept are "public records," then this court should reconsider that decision as one arising and thought to be made necessary because of the exigency of a world wide conflict. However, this court, in a 5 to 4 decision in the **Shapiro** case, made certain findings which are wholly absent here. They are discussed topically as follows:

A) **The Right to Regulate or Prohibit.** In the **Shapiro** case, this Court found that under the exercise of its war powers, Congress had a right to adopt an emergency statute to regulate and prohibit the business of the petitioner. In fact, under the emergency price control act, Congress gave the administrator the right to license businesses and provided for a means of revoking the license in the event of a violation of the act.

In the instant case, this is not true. The wagering tax was imposed by the Revenue Act of 1951 to provide extraordinary increases in revenues to meet essential national defense expenditures as a result of the military action in Korea,⁷ and it was anticipated that \$400 million would be derived annually from the tax on wagers and the occupational tax on the business of accepting wagers.⁸ Congress has no right to regulate or prohibit the wagering business, although it does have a right to tax the business and persons engaged in said business, and this Court held that the wagering act was a revenue act and was not a

⁷ *House Report No. 586*, 82nd Congress, 1st Session.

⁸ *House Report No. 586*, 82nd Congress, 1st Session, and *Senate Report No. 781*, 82nd Congress, 1st Session.

regulatory act in the *Kahriger* case.⁹ In that case, the constitutionality of the wagering act was challenged on the ground that it was an act to regulate and penalize the intrastate wagering business, and therefore, it was adopted in violation of the Tenth Amendment to the Constitution of the United States as an infringement upon the police powers reserved to the individual states. This Court rejected that argument.

In the *Shapiro* case, this Court said:

"The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of **transactions which are the appropriate subjects of governmental regulation**, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained." (Emphasis supplied.)

Thus since the information required to be recorded by the wagering act was not of **transactions which are the appropriate subjects of governmental regulation**, then the *Wilson*, *Davis* and *Shapiro* cases are not controlling.

B) The Necessity of the Record Keeping Provision. In the *Shapiro* case, the Court found that the keeping of the records required by that act was absolutely essential for the regulation of the businesses subject to the act and for the purpose of enabling the administrator to issue regulations, orders, and price schedules; that Congress meant to use the record keeping requirement to put "teeth" into the price control act; and, to enable the administrator to prevent violations.

In the instant case, since the purpose of the wagering act was to raise revenue, and not to regulate, the purpose for keeping records could only be to determine whether the correct amount of tax had been paid, and not for the

⁹ *U. S. v. Kahriger*, 345 U. S. 22.

Secretary of Treasury to issue additional regulations and orders.

For the purposes of collection of taxes there is no need to curtail any of the constitutional rights of an individual. Since the enactment of the income tax law in 1913 the Government has been successfully collecting vast sums of money under our income tax laws. It certainly does not seem necessary for the Government to have this power in order to collect taxes.

Mere convenience of law enforcement should not be sufficient to justify invasions of privacy and the chipping away of the constitutional rights of individuals. As Mr. Justice Jackson in his dissent in the **Shapiro** case, stated:

“It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to.”

Similarly, Mr. Justice Frankfurter in his dissent in the same case observed:

“While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice.”

There is no justification for doing away with the right of privacy or the constitutional privileges against self-incrimination because the case involves a collection of taxes.

(c) **The Public's Interest and Right to Inspect Records.** In the **Shapiro** case the Court found that the keeping of records was for the benefit of the public since these records indicated the price paid for the commodity by the merchant, and the price to be charged to the public for the purchase.

The records required to be kept in the instant case are a daily record showing the gross amount of all wagers on which the taxpayer is liable,¹⁰ and those which show its liability for income tax.¹¹ The public had no right to inspect these records since they were not kept for the benefit of the public. Although the statute conferred a right of inspection, it must be inferred that it was only by a Government Agent in the course of his official duties and only if the privilege under the Fifth Amendment was not asserted. These records did of necessity include information concerning the amount of income tax due the United States and they were, therefore, confidential records, and the information communicated to the Government agent was likewise confidential to such an extent that the disclosure of it by him to the public made him guilty of a misdemeanor and subject to a \$1,000 fine and a one-year imprisonment.¹² How then can it be said that they are public records, when a disclosure of this information to the public made the Internal Revenue Agent subject to imprisonment? It is clear that the records were at all times private papers.

It is conceded by the Petitioners that the Internal Revenue Department had the right to inspect their books, however, subject to their right to refuse under the Fifth Amendment. The right to inspect, however, does not include, and should not be confused with, the right to seize. As this court said in the recent case of **Abel v. U. S.**, ... U. S. ..., 80 S. Ct. 683, at page 695:

“We have held in this regard that not every item may be seized which is properly inspectable by the Government in the course of a legal search; for example, private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them.

¹⁰ 26 U. S. C. 4403.

¹¹ 26 U. S. C. 6001.

¹² 18 U. S. C. 1905, 26 U. S. C. 7213.

Gould v. U. S., 255 U. S. 298, 310, 41 S. Ct. 261, 265, 65 L. Ed. 647."

D) The License Provision and Suspension Thereof. Under the emergency price control act, all persons who were subject to it were required to obtain a license before engaging in the business, and in the event that the licensee violated the terms of the act, this license was subject to suspension¹³ which would prevent them from engaging in that business in the future.

In the instant case, there was no attempt to license people engaged in the wagering business, and constitutionally this was prohibited by the X Amendment of the Constitution which reserved to the State the power not delegated to the federal government. The wagering act provided simply that persons who engaged in the business of accepting wagers were required to register and pay a \$50.00 occupation tax.¹⁴ In fact, the special wagering tax stamp issued by the Internal Revenue Department specifically provided that it was a stamp, and not a license (Defendants' Exs. 1 and 2). Also, since there was no license required to engage in the wagering business, the Government had no right to prohibit a person from engaging in the business.

E) Ownership of Records. The Court in the **Shapiro** case held that documents meeting the "required records" test were public documents which the defendant was required to keep, not for his private uses, but for the benefit of the public. In this case, it is conceded by the Government that the records which were seized were "partnership properties" (R. 41).

It can be clearly seen that the records required to be kept by these defendants do not take on the public aspect,

¹³ 50 U. S. C. A. App. 925 (f).

¹⁴ 26 U. S. C. 4411.

and do not meet the "required records" test as stated by this Court in the **Shapiro** case. Although the records of the Petitioners were required by law to be kept, they are still not the type that come within the "required records exception". As further emphasis, it is pointed out that this Court in the **Shapiro** case, in reviewing the record keeping requirements that were subject to compulsory production, listed twenty-five Federal Acts which they considered to be governed by the rule laid down,¹⁵ however, at no point was the Internal Revenue Code listed as being governed by the same rule.

The records which were required to be kept by the wagering act were not maintained for the purpose of providing information to the Secretary of Treasury, in order to regulate the wagering business; and, the records were not kept for any benefit to the public. Since it has been agreed by the government that the Petitioners owned these records, and by inference that they were not the mere custodians of them; none of the required standards stated by this Court were met.

Mr. Justice Frankfurter in his dissent in the **Shapiro** case advanced cogent reasons why those records were not public records and his arguments are even more compelling in this case. He said, "Certainly, records do not become public records simply because they are required to be kept by law". In his comprehensive analysis of some eleven cases, he found that in those cases where records were required to be kept by law, that they were not considered the records of any individual, but that the individual required to keep them was simply a custodian of them and that he was keeping them for the benefit and inspection of the public.

The lower court in its decision in this case has extended the doctrine laid down by this Court in the **Shapiro** case

¹⁵ See *Shapiro v. U. S.*, 335 U. S. 1, footnote 4.

to all records required to be kept by law, and states that this includes all records required to be kept by Title 26, U. S. C., Sec. 6001. (See appendix.)

Since the Secretary of the Treasury, under the provisions of Sec. 6001, may adopt regulations without consultation with anyone, he alone, under the holding of the lower court, has the absolute and unqualified authority to determine what records are "required". By so doing, his action would change private papers to public papers. By his action, he solely, or one of his subordinates, if he so desired, may limit the application of the Fourth and Fifth Amendments. The Secretary by his administrative act of classifying papers could diminish the rights granted by the Fourth and Fifth Amendments.

Mr. Justice Frankfurter in his dissent in the **Shapiro** case so succinctly stated.

"If Congress, by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers "public" and unprivileged, "there is little left to either the right of privacy or the constitutional privilege."

If it is abhorrent to think that Congress could diminish the constitutional privileges by determining certain papers to be "public", then how much more abhorrent it is to think that this power could rest with one man, the Secretary of Treasury, or his delegate, if he so chose. If the lower courts decision is the law, then indeed we have gone full circle, and once again we have the abuses which the Bill of Rights was adopted to prevent, and which the **Boyd** case stated James Otis described as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book; since they placed 'the liberty of every man in the hands of every petty officer.'"

More is at stake here than the proper choice of words. More is at stake here than whether self confessed gamblers are convicted without regard for due process. The very warp and woof of our constitutional system is being eaten away. The Fourth and Fifth Amendments are the proudest heritage of a free people. The shadow of the torture rack and the horror of the inquisition, or its modern counterpart, brainwashing, loom larger.

Again as Mr. Justice Frankfurter said in his dissent in **Davis v. U. S.**, 66 S. Ct. 1256, 1263,

“It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.”

Therefore, unless this Court sanctions the repeal of the Fourth and Fifth Amendments to the Constitution of the United States by the judicial fiat of the Court below, we believe that this Court is compelled to hold that this decision is wrong and must be reversed.

II.

Memoranda and Reports of the Government Agents Relevant to the Testimony That They Gave on Direct Examination Were Statements Within the Meaning of Title 18, Section 3500 (e) (1), as Conceded by the United States in Their Brief in Opposition to the Writ, and the Trial Court Upon Demand Should Have Ordered Their Production.

The United States has conceded in its Brief in Opposition to the Writ that government agent witnesses' statements are subject to production under Title 18, Sec. 3500

(U. S. B. O. to Writ, p. 11). This concession of the Solicitor General is not only supported by the clear language of Title 18, Sec. 3500 (a), (b), (c) and (e), but by well reasoned opinions in **U. S. v. O'Connor** (2nd Cir.), 273 F. 2d 358; **U. S. v. Prince** (3rd Cir.), 264 F. 2d 850; **U. S. v. Holmes** (4th Cir.), 271 F. 2d 635, and ironically enough in the 7th Circuit in **U. S. v. Berry**, 277 F. 2d 826, and **U. S. v. Sheer**, 278 F. 2d 65, two cases decided within three weeks after the Petition for Rehearing was denied in the instant case, and **U. S. v. Burke** (8th Cir.), 279 F. 2d 824.

The Petitioners, after the direct testimony of the government agent, Ira Minton, demanded any reports relevant to the subject matter of his testimony. Minton admitted that he prepared a report or memorandum after he returned to the office after the interview with Petitioner Kastner on May 6, 1957, and that it related to the subject matter of his testimony (R. 97-99). Government agent witness, Wilbur Buescher, after testifying for the government as to the interview with Petitioner Clancy on December 13, 1956 and as to the interview with Petitioner Donald Kastner and Defendant Prindable on December 14, 1956, also admitted that he made a report which he signed and submitted to his superior relevant to his testimony (R. 101-102). Government agent witness, Mochel, also testified that he made a report after the interviews on December 13 and 14, 1956 (R. 148). Despite the demands,¹⁶ the trial court refused to order the production holding that only statements made "contemporaneously" with the interviews were producible (R. 99-102). The trial court was obviously confusing the situation such as existed in **Palermo v. U. S.**, 360 U. S. 343, where the defense seeks to impeach a witness other than a government witness agent by the government agent's

¹⁶ The demands for the reports are found in the Record at page 97, Minton; 101, Buescher; and Mochel in the Transcript at 302-303.

report. In this case, of course, defense merely sought to impeach the government agent from a report which he admittedly made and testified was relevant to his direct testimony. The lower court in sustaining the trial court relied on three points: (1) the agents who testified were not undercover agents; (2) the order to produce is discretionary with the trial judge; (3) those agents who prepared longhand notes contemporaneously with the interviews were ordered to turn them over (R. 235).

The lower court, however, completely abandoned this criteria in its subsequent decisions in **U. S. v. Berry**, 277 F. 2d 826, and **U. S. v. Sheer**, 278 F. 2d 65 in finding that on similar sets of facts, as set out above, that they came within the purview of the statute, e. g., in the **Berry case**, supra. At page 828, the court says:

"It seems clear that the character of the report of the witness comes within the purview of the statute. Subsection (a) is found to be satisfied when the witness who made the report, 'testified on direct examination in the trial of the case.' It is admitted that the 'statement—of the witness in the possession of the United States—relates to the subject matter as to which the witness has testified,' as required in Subsection (b). It cannot be seriously doubted that the report is covered by the definition found in Subsection (c) (1) as being 'a written statement made by said witness and signed or otherwise adopted or approved by him.' "

U. S. v. Sheer, supra, could not be more similar to the case of these Petitioners. Foster, Sheer and Jackson were indicted on similar counts as were Petitioners Clancy and Kastner, and defendant Prindable, arising out of a continuation of the same city-wide raid conducted on May 6th and May 7th, 1957 by the Internal Revenue Agents in East St. Louis. **U. S. v. Sheer**, 278 F. 2d at 67. Demands were made for the reports by the defendants' at-

torneys, but the same District Judge who presided in the case at bar, the Honorable William G. Juergens, held that the defendants "will be entitled to copies of written statements made contemporaneously with the interviews" (**U. S. v. Sheer**, page 67), but denied the production of the reports. The longhand notes of all the agents were produced with the exception of one who claimed they were lost. **U. S. v. Sheer**, 278 F. 2d 66. The Court of Appeals nonetheless held that the formal reports should have been produced and that the court had no discretion in ordering the production. **U. S. v. Sheer**, supra, at page 68. The case was reversed for new trial on this single question. Certainly, there cannot be one law for one set of defendants, and another law for another set of defendants on the same identical facts.

There cannot be any serious doubt that Congress in enacting Sec. 3500 was seeking to affirm **Jencks v. U. S.**, 353 U. S. 657, and not to overrule it. In the Senate Committee Report No. 569 submitted by Mr. O'Mahoney, 85th Congress, 1st Session, this language is found:

"The committee believes that legislation would be clearly unconstitutional if it sought to restrict due process. On the contrary, the proposed legislation as reported **reaffirms** the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial.

"The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with **authenticated statements and reports of Government witnesses** which relate directly upon his testimony." (Emphasis supplied.)

These Petitioners requested no more, and were entitled to no less. They demanded the reports of the agents which

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the agents, themselves, had admitted they had made and were relevant to their testimony on direct examination. These reports were denied the Petitioners, and the denial cannot be considered harmless error.

In the application of the **Jencks Statute**, Title 18, Section 3500, the harmless error doctrine should be given little play. This court held in **Jencks v. U. S.**, 353 U. S. 657, at pages 668 and 669:

"We hold further that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

If, after the above statement of this Supreme Court, the harmless error doctrine still exists, where the Jencks Statute is involved, it certainly cannot be applied to the case of these Petitioners. These Petitioners were thwarted in their efforts to obtain the reports of Government Agents Ira Minton, Wilbur Buescher and Martin Mochel. Petitioner Clancy was defending himself against the charge of knowingly and wilfully making a false, fictitious, and fraudulent statement to Internal Revenue Agents Mochel and Buescher, and was found guilty on that charge. He was charged jointly with Petitioner Kastner and Defendant Prindable with wilfully and knowingly attempting to evade and defeat a large portion of the waging excise tax due, and in Count V with conspiring with Petitioner Kastner and Defendant Prindable to defraud the United States in the administration of the Internal Revenue laws, and to violate the provisions of Section 1001, Title 18, U. S. C. (false statements). Subparagraphs 2, 3, 4, 5, 6 and 7 of Count IV (R. 28-29) all are based on the interviews of the agents with the Petitioners Clancy and

Kastner and Defendant Prindable and each overt act alleged in Count V (R. 31-32) of the Indictment is also based on the interviews of the agents with the Petitioners Clancy and Kastner, and the Defendant Prindable. Although Petitioner Kastner was found not guilty of making a false statement to Government agents, he was found guilty of the other two charges. Throughout the trial,¹⁷ the issue as to whether or not Kastner was actually a partner in the North Sales Company was strongly disputed (R. 107-111 and 137). Certainly, if Donald Kastner was merely a "ribbon" clerk, as described by one of the government witnesses (R. 137), or clerk, as he designated himself on the receipt taken from him by Agents Kienzler and Minton (R. 107) for the articles seized in the raid, he could not have been convicted on Counts IV and V. **Ingram v. U. S.**, 360 U. S. 545. Agent Minton testified that Kastner stated he was a "junior partner" and clerk in a partnership with Thomas Clancy and James Prindable, (T. 177) and had been a partner for three years. What Minton may have said in his report and which he may have chosen to omit or state differently on the stand, might have had a strong bearing on the jury as to whether or not the Petitioner Kastner was, in fact, a partner in the enterprise. As the Court stated in **Jencks v. U. S.**, 353 U. S. 657 at 667:

"Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

¹⁷ Up to this point we have stated the facts in the light most favorable to the government and stated as fact that Kastner was a partner. At the time of the trial, however, this was disputed.

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Wilbur Buescher's testimony (R. 100) and Martin Moehel's testimony (R. 142-143) served to convict Petitioner Thomas Clancy and Defendant Prindable on the false statement charges, but as demonstrated above, the false statement charges permeated Counts IV and V and every subparagraph thereof and served to convict all the defendants who were jointly charged in Counts IV and V.

It is evident that the demanded reports were statements within the meaning of Title 18, Section 3500, Subparagraph (e) (1), both by the Government's admission and by the clear meaning of the statute. This is not a case in which the statement erroneously withheld from these Petitioners merely duplicated information already in the possession of the defense. It is not a case in which the witness' testimony was unimportant to the proofs necessary for conviction. These reports and memoranda demanded by the Petitioners were just the type of statements which the mandatory language of Title 18, Section 3500, requires production, and the failure of the trial court and the Court of Appeals to acknowledge this fact constitutes reversible error which only this court can remedy.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below be reversed.

Respectfully submitted,

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O'CONNELL and WALLER,

Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 88

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 213-240) ¹ and concurring (R. 240) opinions of the court of appeals are reported at 276 F. 2d 617. The opinion of the district court (R. 43-55), denying, *inter alia*, the motion for return of the seized property and to suppress its use as evidence (R. 48-53), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1960 (R. 240-241). A petition for rehearing was denied on April 14, 1960 (R. 241). The petition for a writ of certiorari was filed on May 13,

¹ "R." refers to the printed record in this Court. "Tr." refers to the reporter's transcript, on file with the Clerk.

APPENDIX A.

AMENDMENTS TO THE CONSTITUTION OF UNITED STATES.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, . . .

STATUTES.

Title 18, U. S. C., Sec. 1905. Disclosure of confidential information generally.

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association; or permits

1960, and was granted on June 27, 1960 (R. 241; 363 U.S. 836). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search, pursuant to a search warrant, of premises where a horse race wagering business was being conducted, and the subsequent use of property seized during the search as evidence against petitioners in their criminal trial, were valid.

2. Whether the trial court's refusal to make available to the defense, for use in cross-examination, the reports of three government agent-witnesses was harmless error. More specifically,

a. Whether the record shows that such error was harmless with respect to agent Minton.

b. Whether, if the facts (not shown by the record) are as we understand them to be with respect to the reports of agents Buescher and Mochel, namely, that the defense received verbatim carbon copies of their reports, the error with respect to them was harmless; and whether the Court should therefore remand for a determination of these factual questions.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 56-61.

STATEMENT

On July 25, 1957 (R. 2), a five-count indictment (R. 24-32) was returned against the petitioners—Thomas Clancy and Donald Kastner—and James Prindable in the United States District Court for the Eastern

any income return or copy thereof or any book containing any abstract or particulars thereof ~~to be seen or examined~~ by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. June 25, 1948, c. 645, 62 Stat. 791.

Title 18, U. S. C., Sec. 3500 (a) (b) and (e). Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(e) The term "statement" as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) A written statement made by said witness and signed or, otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made

by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Sept. 2, 1957, Pub. L. 85-269, 71 Stat. 596.

Title 26, U. S. C., Sec. 4403. Record requirements.

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to Section 6001 (a), Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 525.

Title 26, U. S. C., Sec. 4423. Inspection of Books. Notwithstanding Section 7605 (b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 528.

Title 26, U. S. C., Sec. 6001. Notice or regulations requiring records, statements and special returns. Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulation, to make such returns, render such statements, or keep such records as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 731.

Title 26, U. S. C., Sec. 7201. Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this Title, or the payment thereof, shall in addition to other penalties provided by law, be guilty of a

District of Illinois. Count 1 (R. 24) charged petitioner Clancy with having, on or about December 13, 1956, made a false statement of a material fact to agents of the Internal Revenue Service, in violation of 18 U.S.C. 1001, namely, that the three defendants, partners doing business as the North Sales Company, had no employees or agents accepting wagers on their behalf other than Charles Kastner and Malcolm Wagstaff. Count 2 (R. 24-25) charged petitioner Kastner with having, on or about May 6, 1957, falsely stated to another agent of the Internal Revenue Service that he did not know the names of individuals accepting wagers as agents of the partnership. Count 3 (R. 25-26) charged the making of a false statement by Prindable, who is not before the Court (see fn. 2, *infra*, p. 4). Count 4 (R. 26-29) charged all three defendants with having willfully attempted to evade and defeat a large portion of the wagering excise taxes due the United States for the fiscal year ending June 30, 1957, in violation of 26 U.S.C. 4401 and 7201 (Appendix A, *infra*, pp. 56, 57-58). Count 5 (R. 29-32) charged all three defendants with having conspired, in violation of 18 U.S.C. 371, to defraud the United States in the administration of the internal revenue laws by evading and defeating a large part of their wagering excise taxes and concealing and covering up the names of agents and employees accepting wagers on their behalf.

Following a trial by jury, petitioner Clancy was found guilty on all three of the counts—1, 4 and 5—in which he was charged (R. 188). He was sentenced to four years' imprisonment on each count, to run

felony, and upon conviction thereof, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both, together with the cost of the prosecution.

Title 26, U. S. C., Sec. 7213 (a). Income returns.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

INTERNAL REVENUE REGULATIONS.

Reg. 132, Sec. 325.32. Records.—(a) In general—(1)

Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, at his office or principal place of business, or, if he has no office or principal place of business, at his residence or some other convenient office or safe location, such records as will clearly show as to each day's operation:

(A) The gross amount of all wagers accepted;

(b) Period for retaining records.—The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the tax became due (Reg. 132, Sec. 325.32).

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 41. Search and Seizure.

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States Commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designated or intended for use or which is or has been used as the means of committing a criminal offense;

or . . .